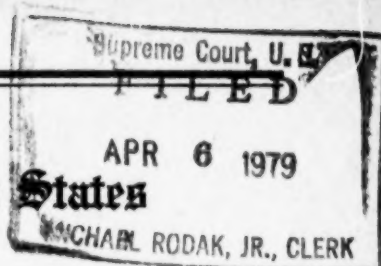


IN THE
Supreme Court of the United States

October Term, 1978

No. 78-1369



COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS,
BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHAR-
LOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN
MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER,
DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA
SWANSON,

Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New York, and GORDON
AMBACH, as Commissioner of Education of the State of New York,

Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LaSALLE ACADEMY, LONG ISLAND LUTHERAN
HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF APPELLEE SCHOOLS
TO DISMISS OR AFFIRM**

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
Opinions Below	2
Question Presented	2
Statement of the Case	2
There is No Substantial Federal Question	8
Conclusion	15

APPENDIX

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Comm. for Pub. Educ. & Religious Liberty v. Levitt</i> , 342 F. Supp. 439 (S.D.N.Y. 1972)	12
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973)	9-10
<i>Levitt v. Comm. for Pub. Educ. & Religious Liberty</i> , 413 U.S. 472 (1973)	2, 8, 12, 14
<i>Meek v. Pittenger</i> , 421 U.S. 349 (1975)	10
<i>New York v. Cathedral Academy</i> , 434 U.S. 125 (1977)	10, 12, 13
<i>Roemer v. Bd. of Pub. Works of Maryland</i> , 426 U.S. 736 (1976)	10
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	9
<i>Wolman v. Walter</i> , 433 U.S. 229 (1977)	2, 3, 8, 10, 11, 12, 14

Statutes and Rule

N.Y. Educ. Law § 3204	9
[1970] Laws of N.Y. ch. 138	12, 13
[1972] Laws of N.Y. ch. 996	12
Ohio Rev. Code § 3317.06 (1976)	8, 10
Rule 16 of the Supreme Court	2

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1369

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B.
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Appellants,

—against—

EDWARD V. REGAN, as Comptroller of the State of New
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Appellees,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG
ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL
and YESHIVAH RAMBAM,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF APPELLEE SCHOOLS
TO DISMISS OR AFFIRM**

Appellees Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam move pursuant to Rule 16 of the Rules of this Court to dismiss this appeal as not presenting a substantial federal question or, in the alternative, to affirm the judgment appealed from.

Opinions Below

The opinions in the three-judge district court, upon which the judgment appealed from is based and which are set forth in Appendices A and B to appellants' Jurisdictional Statement, are reported at 461 F.Supp. 1123 *et seq.*

Question Presented

Whether reimbursement of nonpublic schools for actual costs incurred by them in administering standardized state-prepared examinations and in compiling attendance and other reports for the State of New York presents a substantial federal question in light of *Wolman v. Walter*, 433 U.S. 229 (1977), and *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

Statement of the Case

On June 27, 1977, this Court vacated the district court's injunction of July 26, 1976 against enforcement of Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York¹ and remanded for reconsideration in light of

¹ Hereinafter referred to as "Chapter 507", the full text of which is set forth in Appendix E to appellants' Jurisdictional Statement.

Wolman v. Walter, 433 U.S. 229 (1977). *Levitt v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-595) and *LaSalle Academy v. Comm. for Pub. Educ. & Religious Liberty* (No. 76-713), 433 U.S. 902 (1977).

Upon reconsideration, on December 11, 1978, the three-judge district court held that Chapter 507 "does not violate the Establishment Clause",² Judge Ward dissenting. Judgment was entered on December 20, 1978, dismissing the complaint on the merits.³

After remand, all of the parties to the action entered into a Stipulation of Facts, incorporating samples of the standardized state-mandated and prepared examinations, scoring guides, attendance reporting form and other materials involved under Chapter 507. A copy of this Stipulation is appended to this motion, and a set of the exhibits thereto is being filed herewith in the Office of the Clerk of this Court for ready reference.

The Stipulation of Facts demonstrated the wholly ministerial nature of the services performed by the nonpublic schools, the actual costs of which are reimbursed pursuant to Chapter 507. The Stipulation further demonstrated that audits performed under Section 7 of this statute not entail any involvement between church and state.

Paragraph 20 stipulated, for example:

Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering

² 461 F.Supp. at 1131.

³ A copy of the judgment is set forth in Appendix C to appellants' Jurisdictional Statement.

and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collection of materials; proctoring of examinations; scoring of the examination; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

Exhibit 33 was a sample Deputy and Proctor Certificate which must be signed by each person "who assisted in the administration of Regents examinations", declaring that he or she "fully and faithfully observed" the rules and regulations of those examinations.⁴

The extensive Regents rules and regulations, set forth in Exhibit 30, and the sample Regents examinations in biology (Exhibit 24), English (Exhibit 26) and tenth year mathematics (Exhibit 28) and their state-prescribed scoring keys⁵ (Exhibits 25, 27 and 29, respectively) do not leave room for proselytizing. In fact, most of the tests can be graded by machine. Hence, as the answers to the plaintiffs' interrogatories showed, LaSalle Academy expended only \$119 administering Regents examinations in 1973-74, and neither of the other two larger intervenor-defendant high schools spent as much as \$500.

⁴ The school principal must thereafter also certify compliance on Exhibit 32.

⁵ Exhibit 31 was a sample of the type of rating guide which also accompanies Regents exams.

The Stipulation of Facts provided as follows in regard to attendance-taking:

. . . 23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N . . . is . . . Exhibit 34.

24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from homeroom and classroom teachers; collation of teacher reports; recording of attendance on record forms prepared to meet State specifications; ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers. (footnote omitted)

And, as is true with the standardized tests, the state-approved Register of Attendance (Exhibit 35) does not leave any room for religious input.

Based upon such a clear and concise record, the district court found that:

The lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973-1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this ser-

vice. However, the total amount paid for these attendance-taking services amounted to only approximately 1% to 5.4% of the total amount budgeted by the schools for salaries and fringe benefits. 461 F.Supp. at 1126.

With regard to the state examinations and scoring services, the district court found the risk of their "being diverted to religious purposes . . . altogether too insubstantial to require a departure from *Wolman*"^{*}:

. . . The secular nature of the examinations and the almost entirely mechanical method prescribed for their administration as well as for attendance-taking precludes any substantial risk that the examinations or services will be used for injection or inculcation of religious views or principles, even in a pervasive religious atmosphere. The careful auditing procedure, moreover, insures that State aid will be restricted to these secular services.

. . . The tests administered under the Pupil Evaluation Program (PEP) consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State.

Similarly, the overwhelming majority of the questions on the comprehensive achievement tests consist of objective inquiries requiring the student to choose between multiple answers, which leave no room for any possible religious indoctrination. Although some of the comprehensive achievement examinations may,

among scores of multiple-choice questions, have a question asking students to write an essay on one of several topics specified in the exam, which conceivably could be used by an instructor to gauge a student's grasp of religious ideas and to grade the answer accordingly, the likelihood of such an event is so minimal and the State procedures designed to guard against serious inconsistencies in grading are so complete that there is no "substantial risk that these examinations . . . will [be administered] with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Levitt I, supra*, 413 U.S. at 480. Moreover the State's guidelines for each achievement test and the review procedures (described above) provide an adequate check against any misuse of essay questions.

In short, any benefit to religious indoctrination from the administration of the State examinations by sectarian personnel is at best "indirect" and "incidental" to the secular value of the exams. As the Supreme Court pointed out in [*Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, . . . 413 U.S. [756,] 771, "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is for that reason alone, constitutionally invalid." In the absence of some other potential for diversion we fail to find the possible indirect benefit from this feature of the Statute sufficient to warrant its nullification. 461 F.Supp. at 1128-29 (footnote omitted).

^{*} 461 F.Supp. at 1128.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

The sole question presented by this appeal is whether continued enforcement of Chapter 507 presents a substantial federal question in light of *Wolman v. Walter*, 433 U.S. 229 (1977), and *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973). The district court concluded that no such question is, in fact, presented, and the complaint was ordered dismissed.

The district court reasoned that "*Wolman* . . . must be viewed as rejecting the concept that State support for educational activities necessarily advances religion." Further:

. . . [T]here does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect. We have already determined that the State does not promote religious education by furnishing and allowing sectarian staff members to grade State-prepared exams. Accordingly, the State does

⁷ 461 F. Supp. at 1128. In *Wolman*, eleven of twelve provisions of Section 3317.06 of the Ohio Revised Code (1976) were challenged as unconstitutional. This Court sustained the constitutionality of eight of them, namely, subsections A (textbooks), D (speech-hearing services), F (diagnostic psychological services), G (therapeutic psychological services), H (guidance counseling), I (remedial services), J (standardized testing) and K (services for handicapped children).

Subsections B and C, providing for instructional materials and equipment, and L, providing for field trips, were held to be unconstitutional. Subsection E, providing for medical services, was not challenged.

not improperly promote religion when it reimburses the schools for the cost of administering the exams. 461 F.Supp. at 1129.

And, with respect to reimbursement for the maintenance of attendance records:^{*}

. . . [S]ince record-keeping is essentially a ministerial task lacking ideological content or use, it is not challengeable on *Meek's* theory that any state assistance to the educational process advances religion. 461 F. Supp. at 1130.

The district court's conclusions are well-founded. This Court has repeatedly rejected claims that otherwise permissible programs are invalid because they involve a financial payment which may also involve an indirect or incidental benefit to religious ends. For example, in *Tilton v. Richardson*, 403 U.S. 672 (1971), Chief Justice Burger stated in his lead opinion:

The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. 403 U.S. at 679.

In *Hunt v. McNair*, 413 U.S. 734 (1973), Mr. Justice Powell pointed out that

^{*} These records (see Exhibit 35 to the Stipulation of Facts) are maintained on a daily basis, reflecting pupil attendance during the day, rather than at specific classes. In view of the requirements as to secular subjects required to be taught in New York's nonpublic schools, any benefit accruing because of a pupil's attendance at a religion class in the course of a day principally devoted to secular subjects is surely incidental to the recognized need to maintain such attendance records for clearly secular purposes. Cf. N.Y. Educ. Law § 3204.

the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. 413 U.S. at 743.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), Mr. Justice Stewart again reminded us that

it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. 421 U.S. at 359.

And in *New York v. Cathedral Academy*, 434 U.S. 125 (1977), Mr. Justice Stewart stated the matter as follows:

. . . [T]his Court has never held that freeing private funds for sectarian uses invalidates otherwise secular aid to religious institutions⁹

In sum, the fact that payments are authorized under Chapter 507 does not require a finding that they are violative of the First Amendment. Certainly, after *Wolman*, there should not be any claim that non-ideological state-required programs such as the maintenance of attendance records or the use of standardized state-prepared examinations in nonpublic schools offend the Establishment Clause, nor should there be any claim that use of public funds in support thereof is unconstitutional.

In *Wolman*, this Court sustained the constitutionality of subsection J of the Ohio statute, providing for state purchase of standardized tests and scoring services used in nonpublic schools, as follows:

⁹ 434 U.S. at 134, citing *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 747 n.14 (1976).

In *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973), this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for the expenses of teacher-prepared testing. The reasoning behind that decision was straightforward. The system was held unconstitutional because "no means are available, to assure that internally prepared tests are free of religious instruction." *Id.*, at 480.

There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education. *Id.*, at 479-480, n.7. The State may require that schools that are utilized to fulfill the State's compulsory education requirement meet certain standards of instruction, *Allen*, 392 U.S., at 245-246, and n.7, and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled. *Levitt*, 413 U.S., at 479-480, n.7; *Lemon*, 403 U.S., at 614. See App. 28. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that §3317.06(J) is constitutional. 433 U.S. at 239-41 (footnote omitted) (Blackmun, J.).

It is precisely the infirmity in *Levitt* referred to, namely, reimbursement of the costs of internally-prepared examinations, which has been remedied by Chapter 507.

Having concluded that Chapter 507 does not advance religion, the district court concluded that the activities reimbursed by the statute "do not pose any substantial risk of . . . entanglement". 461 F.Supp. at 1130 (footnote omitted).

Appellants contend in their Jurisdictional Statement that Chapter 507 fosters an excessive government entanglement with religion, and they seek support in *New York v. Cathedral Academy*, *supra*, but that case is not relevant here.

Cathedral Academy involved an effort by the New York Legislature to correct an inequity it found to exist as a result of the timing of the entry of the judgment in *Comm. for Pub. Educ. & Religious Liberty v. Levitt*, 342 F.Supp. 439 (S.D.N.Y. 1972), *aff'd*, 413 U.S. 472 (1973). In enacting Chapter 996 of the 1972 Laws of New York, the Legislature had incorporated verbatim the operative language of the so-called Mandated Services Act,¹⁰ the enforcement of which had been permanently enjoined.

This critical factor was clearly recognized by Mr. Justice Stewart in *Cathedral Academy*, just as Mr. Justice Blackmun clearly recognized in *Wolman*, as quoted above, the precise infirmity which had led the Court in *Levitt* to conclude that the Mandated Services Act was unconstitu-

¹⁰ [1970] Laws of N.Y. ch. 138.

tional. The Court's opinion in *Cathedral Academy* reads, in pertinent part, as follows:

. . . The New York statute was held to be constitutionally invalid because "the aid that [would] be devoted to secular functions [was] not identifiable and separable from aid to sectarian activities." *Levitt v. Committee for Public Education*, 413 U.S., at 480. This was so both because there was no assurance that the lump-sum payments reflected actual expenditures for mandated services, and because there was an impermissible risk of religious indoctrination inherent in some of the required services themselves. We noted in particular the "substantial risk that . . . examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." *Ibid.* Thus it can hardly be doubted that if ch. 996 authorizes payments for the identical services that were to be reimbursed under ch. 138, it is for the identical reasons invalid. 434 U.S. at 131.

Stated another way, the constitutional infirmity in Chapter 138, namely, reimbursement of expenses incurred in administering teacher-prepared exams, was retained in Chapter 996, thereby also retaining either the same potential advancement of religion through such exams or the same potential entanglement of the State with nonpublic schools in determining the content of those exams. *See New York v. Cathedral Academy*, 434 U.S. at 133.

Chapter 507 has remedied this infirmity by eliminating any reimbursement of expenses incurred in administering teacher-prepared exams and by restricting any testing re-

imbursement to the actual costs of administering the standardized state-prepared examinations.

With regard to the procedures prescribed by Chapter 507 to audit the actual costs, this Court stated in *Wolman*:

. . . [T]he inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. 433 U.S. at 240-41 (Blackmun, J.).

In *Levitt*, this Court was careful to indicate that actual costs incurred in performing secular services are reimbursable. It stated:

We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function.

Accordingly, the judgment of the District Court is affirmed. 413 U.S. at 482.

Chapter 507 is the result of the Legislature's adherence to this Court's teaching in *Levitt*.

Conclusion

In view of the foregoing, this appeal should be dismissed since it does not present a substantial federal question or, in the alternative, the judgment appealed from should be affirmed.

Dated: April 6, 1979

Respectfully submitted,

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APPENDIX

Stipulation of Facts

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2648 RJW

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B.
ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HEN-
KIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER,
REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH
NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H.
SUMNER and CYNTHIA SWANSON,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York,
and EWALD B. NYQUIST, as Commissioner of Education
of the State of New York,

Defendants,

—and—

HORACE MANN-BARNARD SCHOOL, LASALLE ACADEMY, LONG
ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL
and YESHIVAH RAMBAM,

Intervenor-Defendants.

IT IS HEREBY STIPULATED AND AGREED by and between the
undersigned, attorneys for all of the parties hereto, as
follows:

1. Chapter 507, as amended by Chapter 508, of the 1974
Laws of New York¹ became law on May 23, 1974.

¹ Hereinafter referred to as "Chapter 507".

2. On June 20, 1974, the complaint was filed herein, seeking a declaratory judgment that Chapter 507 is unconstitutional and a permanent injunction against its enforcement.

3. On December 11, 1974, Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School, St. Michael School and Yeshivah Rambam, all of which are nonprofit, nonpublic schools located within the State of New York, were granted leave to intervene in this action as parties defendant.

4. For purposes of this action, the intervenor-defendants may be considered typical of, but not identical with, other nonpublic schools in the State of New York.

5. Each of the intervenor-defendants has performed services for which reimbursement is provided pursuant to Chapter 507.

6. Each of the intervenor-defendants has duly applied for apportionments from the State of New York pursuant to Chapter 507 for the school years 1973-74, 1974-75 and 1975-76. To date, each of the intervenor-defendants has received apportionments for the first two of these school years, namely, 1973-74 and 1974-75.

7. The plaintiffs served written interrogatories upon the defendants and upon the intervenor-defendants which were responded to by defendant Nyquist on February 7, 1975 and by each of the intervenor-defendants on April 9, 1975.

8. The interrogatory responses and exhibits thereto of defendant Nyquist and of each of the intervenor-defendants

have been filed with the Clerk of the Court and are a part of the record herein.

9. On March 19, 1975, the plaintiffs' motion to convene a three-judge district court was granted pursuant to 28 U.S.C. §§2281, 2284.

10. The three-judge court entered a judgment herein on July 28, 1976, permanently enjoining enforcement of Chapter 507 as applied to "sectarian schools".

11. On June 27, 1977, the United States Supreme Court vacated the three-judge court's judgment of July 28, 1976 and remanded the case for reconsideration in light of the decision in *Wolman v. Walter*, 433 U.S. —, 97 S.Ct. 2593 (1977).

12. On September 12, 1977, the three-judge court held a hearing on the plaintiffs' application for a preliminary injunction against enforcement of Chapter 507 "pending the trial of the issues herein".

13. On September 15, 1977, the three-judge court filed an Interim Order, among other things ordering that

the parties in this case promptly endeavor to prepare and will, on or before September 27, 1977, file with this court a stipulation of facts describing the actual services rendered by personnel in non-public schools for which reimbursement under Chapter 507 is available, including the actual duties that are or would be performed by such personnel with regard to compliance with New York's pupil evaluation program, the basic educational data system, Regents' examinations, statewide evaluation plan, uniform procedure for pupil

attendance reporting, and any other similar state prepared examinations and reporting procedures, the costs of which are reimbursable under Chapter 507. With regard to any examinations which may be graded by non-public school personnel, information shall be supplied specifying whether any review of such grading is performed by the State and, if so, the nature of such review. Wherever possible, copies of typical examinations, tests or other documents used in complying with pertinent New York State testing, evaluation and reporting requirements should be furnished to this court;

and further ordering that

the parties include with the stipulation of facts to be filed on or before September 27, 1977, a precise description of the method used to compute the amounts apportioned to schools seeking payments under Chapter 507. Information should also be supplied regarding any restrictions imposed on the use of such payments by the schools following their receipt.

14. A number of standardized tests are provided by the Education Department to help improve the educational program offered in the schools of the State of New York. All tests and accessories are offered at no charge.

15. The Education Department has established a state-wide Pupil Evaluation Program (PEP), a full testing program required of all pupils in grades 3 and 6 in the public and nonpublic schools in New York State. Tests for pupils in Grade 9 are also available for schools that wish to use them on an optional basis. The tests used in the program are standardized reading and mathematics achievement tests developed and published by the Education Department and based on New York State courses of study:

<i>Grade</i>	<i>Name of Test²</i>	<i>No. of Questions</i>	<i>Testing Time in Minutes</i>	<i>Type of Scoring</i>
3	New York State Test in Reading—Beginning Grade 3—Form C	50	45	Hand or Machine
3	Mathematics Test for New York State Elementary Schools—Beginning Grade 3—Form C	60	50	Hand or Machine
	Pt. 1. Concepts	(26)	(20)	
	Pt. 2. Computation	(16)	(12)	
	Pt. 3. Problem Solving	(18)	(18)	
6	New York State Test in Reading—Beginning Grade 6—Form C	50	50	Hand or Machine
6	Mathematics Test for New York State Elementary Schools—Beginning Grade 6—Form C	67	60	Hand or Machine
	Pt. 1. Concepts	(27)	(20)	
	Pt. 2. Computation	(20)	(20)	
	Pt. 3. Problem Solving	(20)	(20)	
9	New York State Test in Reading—Beginning Grade 9—Form A	50	50	Hand or Machine
9	New York State Test in Mathematics—Beginning Grade 9—Form A	80	60	Hand or Machine
	Pt. 1. Concepts	(32)	(18)	
	Pt. 2. Skills	(24)	(16)	
	Pt. 3. Problem Solving	(24)	(26)	

² Samples of the Third and Sixth Grade tests and their scoring keys are appended hereto as Exhibits 1 through 8, respectively. Samples of the Ninth Grade tests and their instruction manuals and scoring keys are appended hereto as Exhibits 9 through 14.

The Education Department sends order forms for test materials to each school administrator or principal, who fills out and returns the order forms to the Department. The Department ships the test materials and the score report forms directly to the schools according to directions on the order forms. The schools administer and score the tests, fill out the score report forms, and return them to the Department.

Schools prepare frequency distributions of the scores of their pupils and report these distributions to the State Education Department on Optical Scanning report forms.³ The distributions of scores are processed by computer, and several reports which summarize the results in conveniently interpretable form are returned to each school and central office. A copy of each report is kept on file in the Education Department, and, in addition, the Department prepares a statewide annual summary report which highlights trends and needs in various types of schools and communities throughout the State.

The reports sent to schools and school-system central offices are as follows:

<i>Name of Report⁴</i>	<i>Distribution</i>
1. School Testing Report A. School Summary Table B. Total Score Distribution Tables	Copies to both the school and the central office
2. Five-Year Summary Report	Copies to both the school and the central office
3. Five-or-More School Buildings Report	Copy to central office only
4. Performance Indicators in Education (PIE) Report	Copy to central office only

³ Samples of these reports are appended hereto as Exhibits 15, 16 and 17.

⁴ Samples of these reports are appended hereto as Exhibits 18 through 21, respectively.

16. Nonpublic-school personnel perform the following services in regard to PEP tests: ordering and receiving of test materials; arranging for space, time, proctors, distribution and collection of test materials; proctoring of tests; arranging for scoring of the exams, either by machine or by hand; and collection, collation and reporting of results to the State Education Department.

17. Nonpublic schools are required to file by a specific date each year a Basic Educational Data System (BEDS) Report of Nonpublic Schools with the Bureau of Educational Data Systems of the State Education Department. A sample of such a report is appended hereto as Exhibit 22, and a sample of the Instruction Manual is appended hereto as Exhibit 23.

18. Nonpublic-school personnel perform the following services in regard to BEDS reports: collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report.

19. Regents examinations are end-of-course comprehensive achievement tests based on State courses of study for use in grades 9-12. They are prepared by the Education Department and may be administered only at official centers within the State of New York. The official centers include (1) all registered secondary schools and (2) other educational institutions which have been given specific approval to administer Regents examinations.

Regents examinations are provided presently in 19 subjects: Biology; Bookkeeping and accounting II; Business law; Business mathematics; Chemistry; Earth science;

English; French; German; Hebrew; Italian; Latin; Ninth year mathematics; Tenth year mathematics; Eleventh year mathematics; Physics; Shorthand II and transcription; Social Studies; and Spanish. Samples of the June 1977 Regents examinations in Biology, English and Tenth year mathematics and their scoring keys are appended hereto as Exhibits 24 through 29, respectively.

The school principal or chief administrative officer of the examination center is responsible for the enforcement of the regulations for administering Regents examinations.

Order forms for both examination booklets and scoring keys are mailed to schools well in advance of the examination periods. Complete instructions and an examination schedule are enclosed with the order forms. Orders must be returned by the date specified in the instructions.

Examination booklets are shipped directly to schools so as to arrive a few days prior to the start of the Regents examination period. The booklets are shipped in locked metal boxes, and the padlock keys are sent to the principal by first-class mail.

Generally, scoring keys are not shipped with the examination booklets; rather, they are sent to a regional center for release after the uniform statewide admission deadline for each examination. Schools must arrange to pick up scoring keys from the regional center which they designate on their order forms.

The principal must keep the examination materials in a fireproof and burglarproof safe or vault. A locked closet is not adequate. If possible, the materials are kept in the locked metal box in which they were received. Box keys and vault combinations must be maintained under strict security conditions to preclude access to the examination materials by students and other unauthorized persons. All school building personnel who may receive the Regents

examination shipment, either during or after regular school hours, must be informed by the principal concerning the security procedures to be followed.

If a safe or vault is not available in the school, the principal must make arrangements to store the examination materials in the vault of a bank or in the vault of another school, school district building or BOCES. If such arrangements cannot be made, it is the responsibility of the principal to notify the Bureau of Elementary and Secondary Educational Testing so the examination materials can be sent to an appropriate storage facility.

Each teacher or deputy employed in the conduct of Regents examinations must read with care, prior to the examination date, the appropriate sections of the Regents Examination Manual.⁵ All proctors must enforce the regulations in every particular.

The principal is responsible for the rating of all papers written in the school. He is required to establish rating and checking procedures that will assure reasonable confidence in the accuracy of the ratings assigned to the examination papers.

To assist teachers in properly rating Regents examinations, the Education Department makes rating guides available, a sample of one of which is appended hereto as Exhibit 31.

At the conclusion of each examination period, the Education Department asks each school to submit for review both the passing and the failing papers written in certain subjects. In March/April and in August, schools are asked to return papers in all subjects. In January and June, a random sampling procedure is used so that the subjects selected will vary from school to school and from year to

⁵ A sample is appended hereto as Exhibit 30.

year. Under this sampling procedure, every paper written in a school is equally likely to be selected regardless of which papers may have been reviewed in previous years.

Principals are required to make the necessary arrangements to have requested papers shipped promptly to the Department in the Regents box. Only the papers in subjects requested for review are submitted. All papers not requested to be sent in for Department review must be retained in the school files for at least one year. Any or all of these papers may be called for official review during this period.

The Regents examination papers submitted by each school are very carefully reviewed at the Department by a special group of experienced classroom teachers, under the supervision of the Department staff. Apparent discrepancies or errors in school ratings are called to the attention of the principal.

Every principal who orders Regents examinations must submit a Regents Examination Report.* The information required in the report includes, in addition to the number of Regents examination papers written and the number passing in each subject, the total enrollment in each subject for which a Regents examination is offered. Every Regents examination administered, for whatever purpose, shall be included in the Regents Examination Report.

The principal must certify on this report that the rules and regulations for administering Regents examinations were faithfully observed. And each deputy and proctor must certify, by individually signing a certificate, that the rules and regulations for administering Regents examinations were faithfully observed. A sample Deputy and Proctor Certificate is appended hereto as Exhibit 33.

* A sample is appended hereto as Exhibit 32.

20. Nonpublic-school personnel perform the following services in regard to Regents examinations: ordering and receiving the examination materials; arranging and maintaining security of materials until specified date and time; arranging for space, time, proctors, distribution and collection of materials; proctoring of examinations; scoring of the examinations; collection and collation of examination materials and results; recording of grades on student records; arranging for return of examination materials to the State Education Department; and arranging for safe storage of all other examination papers.

21. The "statewide evaluation plan" referred to in Section 3 of Chapter 507 has not yet been implemented by the Education Department, and no nonpublic school has sought reimbursement for compliance therewith.

22. Section 3211 of the New York Education Law provides, in part:

Records of attendance upon instruction

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction, or any other school district employee as may be designated by the commissioner of education under section three thousand twenty-four of this chapter, shall keep an accurate record of the attendance and absence of such minor. Such record shall be in such form as may be prescribed by the commissioner of education. . . .

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of the records

of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends, as provided by part one of this article, shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. He shall give prompt notification in writing to the school authorities of the city or district of the discharge or transfer of any such minor from attendance upon instruction, stating the date of the discharge, its cause, the name of the minor, his date of birth, his place of residence prior to and following discharge, if such place of residence be known, and the name of the person in parental relation to the minor.

23. Nonpublic schools are required to submit by July 15th of each year an Attendance Report, Form AT-6N, to the State Education Department. A sample Form AT-6N was appended as Exhibit 6 to defendant Nyquist's responses to the plaintiffs' interrogatories, and a sample is appended hereto as Exhibit 34.

24. Nonpublic-school personnel, generally an attendance secretary (or secretaries), perform the following services in regard to the State's uniform procedure for attendance reporting: collecting of attendance reports from home-room and classroom teachers; collation of teacher reports;

recording of attendance on record forms prepared to meet State specifications;⁷ ongoing record-keeping related to data which is required for Form AT-6N and all other State Education Department and local-school-district reports; and processing and recording of new registrations and transfers.

25. The Regents Scholarship and College Qualification Test (RSCQT) has been used as the competitive examination in awarding Regents scholarships to high school graduates residing in New York State.⁸ In addition, the RSCQT has been used as one of the required admissions tests for the various units of the State University. On a broader scale, the results of the RSCQT have been used by guidance counselors to assist high school seniors seeking admissions to colleges throughout the State and country.

A new examination was prepared each year and administered in late September or early October in approved high schools of the State, under the supervision of their principals. The answer papers have been scored at the State Education Department, with the score reports sent to the schools in December.

Three different types of Regents scholarships have been awarded: the Regents college scholarship, the Regents professional education in nursing scholarship, and the Regents scholarship for Cornell University. All scholarships are limited to full-time study in approved programs situated in New York State. No assistance can be received for theological study.

⁷ A sample of a State-approved Register of Attendance which nonpublic schools purchase for this purpose is submitted herewith as Exhibit 35.

⁸ For the first time, during the present school year (1977-78), a different testing program will be used.

The RSCQT has been divided into two parts, Part 1 administered in the morning and Part 2 in the afternoon.*

Part 1 has been a test of general scholastic aptitude, containing questions intended to measure ability to think clearly and accurately. Candidates have been required to demonstrate capacity to perceive relationships, to reason logically and to solve problems. The questions have not been directly related to the subject matter of courses studied but depend rather upon general capacity to undertake college-level work successfully. Part 2 has been a test of subject matter achievement directly related to courses studied in high school.

To provide a general picture of the scope of the RSCQT, the subtests are indicated below, together with the approximate number of questions and credits assigned to each. Each question is worth one credit.

Part 1: General scholastic aptitude	150
Same-opposite	30
Verbal analogy	40
Sentence completion	30
Arithmetic reasoning	50
Part 2: Subject matter achievement	150
English	40
Social studies	40
Art and music	10
Science (general science and biology)	30
Mathematics (through 10th year mathematics) ..	30
Total	300

Each March, principals of approved high schools in New York State have been requested to order, on forms provided at that time, all materials for the examination scheduled for the following fall.

* For a description of the RSCQT, see Exhibit 36 hereto.

The regulations and procedures for administering the RSCQT were generally comparable to those for administering Regents examinations. However, there were important differences due particularly to the competitive nature of the examination. The question booklet had to be held secure at all times, after the examination as well as before. This meant that all question booklets, both used and unused, had to be returned to the Department immediately following the examination and that only scholarship candidates were permitted access to the content of the booklets during the examination.

Copies of the RSCQT Administration Manual¹⁰ have been distributed prior to each examination period. This manual contained detailed instructions for administering the examination, including instructions to be read verbatim to candidates. Each principal and proctor has been required to read the examination manual and to become thoroughly familiar with the examination procedure well in advance of the examination date.

26. Optional State high school achievement examinations,¹¹ basic competency tests,¹² and New York State standardized tests in Grade 6 science, 7th and 8th Grade mathematics¹³ and in physical fitness, Grades 4-12 are administered by nonpublic-school personnel in nonpublic schools. When administered, the services performed by such per-

¹⁰ A sample is appended hereto as Exhibit 37. Nonpublic-school personnel performed the services specified therein.

¹¹ Samples and their scoring keys are appended hereto as Exhibits 38 through 41.

¹² Samples and their instructions and scoring keys are appended hereto as Exhibits 42 through 48.

¹³ Samples and their direction manuals and scoring keys are appended hereto as Exhibits 49 through 54, respectively.

sonnel are prescribed by the respective Department of Education test materials and instructions.

27. By October 15th of each year, secondary nonpublic schools are required to file a Secondary School Report with the Education Department. A sample of such a report is appended hereto as Exhibit 55.

28. In filing Secondary School Reports, nonpublic-school personnel perform the same tasks as are performed in regard to the BEDS reports, as specified in paragraph 18 above.

29. Section 176.2 of the Regulations of the Commissioner of Education provides:

Application for apportionment and required accounting records.

(a) A nonpublic school requesting apportionment of State monies in connection with Chapter 507 of the Laws of 1974 shall submit an application to the State Education Department in the form and at such time as the Commissioner of Education shall require. In addition such nonpublic school shall submit completed apportionment worksheets as required by the Commissioner of Education.

(b) Each nonpublic school making application for apportionment during the school year 1975-76 and thereafter shall maintain at least the following records in support of the claim for apportionment:

(1) A separate set of expenditure accounts for each required service showing the amounts which are claimed for apportionment. These shall include

accounts for salaries, supplies and materials, contractual expenses and fringe benefits.

(2) A time record for each employee involved in providing services for which apportionment is requested. This record shall clearly indicate the amount of time devoted to each service.

(3) An individual salary record for each employee involved in providing services for which apportionment is requested. This record shall show gross salary, payroll deductions and net salary by payroll period. Payroll summary records yielding the same information may be maintained in lieu of individual salary records.

(4) A voucher file which shall include all paid vouchers, in whole or in part, used to substantiate costs included in the claim for apportionment.

30. The responses to the plaintiffs' interrogatories filed herein each contained copies of State Education Department Forms SA-186 and SA-187. These forms show precisely the method used to compute the amounts apportioned to the intervenor-defendants under Chapter 507 for the school year 1974-75. They are appended hereto as Exhibits 56 through 60 and are referred to for the contents thereof.

31. Chapter 507 restricts apportionments to the actual costs incurred by nonpublic schools in performing the specified required services. These costs are calculated pursuant to the Forms SA-186 and SA-187 and are reimbursed during the succeeding school year when nonpublic schools are incurring similar costs anew. As a rule, apportionments received pursuant to Chapter 507 are placed in gen-

eral accounts and cease to be identifiable as to disbursement.

Dated: New York, New York
September 26, 1977

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